THE RIGHT OF A SELLER OF GOODS TO RECOVER THE PRICE.

Dedicated to Professor Langdell.

THE English Sale of Goods Act provides in regard to the seller's right to sue for the price upon a contract of sale: [1]

"(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

"(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract."

There can be no doubt of the correctness of the first provision of the foregoing section; namely, that where the property in the goods has passed and the buyer wrongfully neglects or refuses to pay for them, the seller may recover the price. Of course credit may have been given or the price may have been payable upon condition, and unless the term of credit has expired or the condition happened, no recovery can be had. In such a case the refusal of the buyer to pay would not be wrongful. The affirmative provision of the statute contains, however, the negative implication that unless the property in the goods has passed to the buyer, the seller cannot maintain an action for the price. This, indeed, expresses the general rule of the English law,[2] and the reason for the rule is plain. As the seller still is owner of the goods, he ought not to be given also the price for them. His damage is the difference in value between what he now has, namely, the goods, and what he would have had if the defendant had not broken his contract, namely, the price. Nevertheless, a large number of states do not follow the English law in this matter. If the reason why the property in the goods has not passed to the buyer is because

[1] § 49.

[2] Atkinson *v.* Bell, 8 B. & C. 277. See also Elliott *v.* Pybus, 10 Bing. 512.

the buyer wrongfully refused to take title when offered to him, according to the weight of authority, perhaps, in this country, the seller may recover the full purchase price.[1] The reason for allowing this is not always very clearly stated. The earliest decision was in a New York case,[2] an action for the price of a sulky built to order by the plaintiff for the defendant and refused when tendered by the plaintiff, who thereupon said he would leave it with a third person and accordingly did so. In allowing the plaintiff to recover the full price the court relied on early cases under the Statute of Frauds.[3] In these early cases it was held that such a contract as the one in suit was a contract not of sale but for work and labor. This being true, the court held as a consequence that though the plaintiff did not recover the price directly, as for goods sold, the amount of recovery should be, nevertheless, fixed by the price, since that was the agreed value of the labor. The only way in which this reasoning can be answered in a wholly satisfactory way is by confessing that the authorities, under the Statute of Frauds, which have held that a contract for goods to be made to order is not a contract of sale but a contract for work and labor, are erroneous. This is now admitted in England, and the early decisions are overruled.[4] But in many states in this country it is still law that where goods are to be made to order, which are of a special kind differing from those ordinarily made by the seller, the contract is not one of sale, but for work and labor; [5] and in

[1] Habeler *v.* Rogers, 131 Fed. Rep. 43, 45 (C. C. A.); Kinkead *v.* Lynch, 132 Fed. Rep. 692; Magnes *v.* Sioux City Seed Co., 14 Colo. App. 219; Darby *v.* Hall, 3 Pennewill (Del.) 25; Ames *v.* Moir, 130 Ill. 582; Trunkey *v.* Hedstrom, 131 Ill. 204, 209; Osgood *v.* Skinner, 211 Ill. 229; Comstock *v.* Price, 103 Ill. App. 19; Dwiggins *v.* Clark, 94 Ind. 49; Rastetter *v.* Reynolds, 160 Ind. 133; Moline Scale Co. *v.* Beed, 52 Ia. 307; McCormick Machine Co. *v.* Markert, 107 Ia. 340; Bell *v.* Offutt, 10 Bush (Ky.) 632, 639; Singer Mfg. Co. *v.* Cheney, 21 Ky. L. Rep. 550; Ozark Lumber Co. *v.* Chicago, 51 Mo. App. 555; Gordon *v.* Norris, 49 N. H. 376; Black River Lumber Co. *v.* Warner, 93 Mo. 374; Bement *v.* Smith, 15 Wend. (N. Y.) 493; Dustan *v.* McAndrew, 44 N. Y. 72, 78; Atkinson *v.* Truesdell, 127 N. Y. 230; Van Brocklen *v.* Smeallie, 140 N. Y. 70; Craigin *v.* O'Connell, 50 N. Y. App. Div. 339; 169 N. Y. 573; Levy *v.* Glassberg, 92 N. Y. Supp. 50 (Sup. Ct., App. Term); Shawhan *v.* Van Nest, 25 Oh. St. 490; Rhodes *v.* Mooney, 43 Oh. St. 421, 425; Smith *v.* Wheeler, 7 Ore. 49; Reynolds *v.* Callender, 19 Pa. Super. Ct. 610; Ballentine *v.* Robinson, 46 Pa. St. 177; Pratt *v.* S. Freeman & Sons Co., 115 Wis. 648.

[2] Bement *v.* Smith, 15 Wend. (N. Y.) 493 (1836).

[3] Towers *v.* Osborne, Str. 506; Crookshank *v.* Burrell, 18 Johns. (N. Y.) 58.

[4] Lee *v.* Griffin, 1 B. & S. 272.

[5] Flynn *v.* Dougherty, 91 Cal. 669; Atwater *v.* Hough, 29 Conn. 508; Cason *v.* Cheely, 6 Ga. 554; Yoe *v.* Newcomb, 33 Ind. App. 615; Edwards *v.* Grand Trunk Ry. Co., 48 Me. 379; Crockett *v.* Scribner, 64 Me. 447; Mixer *v.* Howarth, 21 Pick. (Mass.)

other states it is held that in any case where the contract is for the sale of a commodity not in existence at the time, and which the seller is to manufacture or put in a condition to be delivered, the contract is one for work and labor.[1]

It may be doubted whether the states which have adopted one or the other of these views under the Statute of Frauds would generally admit, as a consequence of their decisions, that the contracts in question should be treated as contracts for work and labor in such a sense that the price must be paid for the work rather than for the title to the property. It would indeed be unfortunate if the strained construction which has been adopted in order to evade the Statute of Frauds should be applied in other classes of cases. It should rather be said, and probably would be, that though a contract may not be a contract of sale within the meaning of the Statute of Frauds, if it is contemplated that special work and labor by the seller shall go into it, it is, nevertheless, a contract of sale for other purposes. There can, in fact, be no doubt that the price is promised for the completed article, not for the work and materials which have gone into its manufacture. The reason, therefore, on which Bement *v.* Smith[2] was rested cannot be supported. It is not generally adopted today,[3] and the New York court has long ceased to rest the buyer's right to the price on this reason. A later New York decision[4] laid down the rule broadly that

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205; Goddard *v.* Binney, 115 Mass. 450; Turner *v.* Mason, 65 Mich. 662; Russell *v.* Wisconsin Ry. Co., 39 Minn. 145; Brown & Haywood Co. *v.* Wunder, 64 Minn. 450; Pitkin *v.* Noyes, 48 N. H. 294; Prescott *v.* Locke, 51 N. H. 94; Pawelski *v.* Hargreaves, 47 N. J. L. 334; Mechanical Boiler Co. *v.* Kellner, 62 N. J. L. 544; Roubicek *v.* Haddad, 67 N. J. L. 522; Orman *v.* Hager, 3 N. M. 331; Puget Sound Depot *v.* Rigby, 13 Wash. 264; Meincke *v.* Falk, 55 Wis. 427; Hanson *v.* Roter, 64 Wis. 622; Gross *v.* Heckert, 120 Wis. 314; Williams-Hayward Co. *v.* Brooks, 9 Wyo. 424. See also Sawyer *v.* Ware, 36 Ala. 675; Scales *v.* Wiley, 68 Vt. 39.

[1] Bennett *v.* Nye, 4 Greene (Ia.) 410 (*cf.* Mighell *v.* Dougherty, 86 Ia. 480; Lewis *v.* Evans, 108 Ia. 296; Dierson *v.* Petersmeyer, 109 Ia. 233); Eichelberger *v.* McCauley, 5 Har. & J. (Md) 213; Bagby *v.* Walker, 78 Md. 239; Deal *v.* Maxwell, 51 N. Y. 652; Higgins *v.* Murray, 4 Hun (N. Y.) 565, 73 N. Y. 252; Parsons *v.* Loucks, 48 N. Y. 17; Cooke *v.* Millard, 65 N. Y. 352; Hinds *v.* Kellogg, 13 N. Y. Supp. 922; aff. 133 N. Y. 536; Deal *v.* Maxwell, 51 N. Y. 652; Talmadge *v.* Lane, 17 N. Y. Misc. 731, 41 N. Y. Supp. 413. See also Roubicek *v.* Haddad, 67 N. J. L. 522; Warren Co. *v.* Holbrook, 118 N. Y. 586, 593; Joy *v.* Schloss, 15 Abb. N. C. (N. Y.) 373; Winship *v.* Buzzard, 9 Rich. (S. C.) 103; Suber *v.* Pullin, 1 S. C. 273; Mattison *v.* Wescott, 13 Vt. 258; Ellison *v.* Brigham, 38 Vt. 64; Forsyth *v.* Mann, 68 Vt. 116; also Hientz *v.* Burkhard, 29 Ore. 55.

[2] 15 Wend. (N. Y.) 493.

[3] It was, however, followed in Ballentine *v.* Robinson, 46 Pa. St. 177.

[4] Dustan *v.* McAndrew, 44 N. Y. 72.

any seller might at his option store or retain the property for the vendee and sue him for the entire purchase price. This doctrine is stated broadly as applicable not only to cases where the title has passed, but to cases where the buyer's default consists in not letting it pass.[1] This decision and the rule laid down therein have been very influential in other jurisdictions, and cases which refuse to confine the seller to the difference between the contract price and the market price generally go back to this New York decision for their foundation.

Of course, if the seller is entitled to the price, the buyer must be entitled to the goods. At what moment the title passes to him is not much discussed in the decisions, but the statement of the rule that the seller may store or retain the property for the buyer implies that when the seller deposits the goods with a third person for the buyer, or gives notice to the buyer by suing for the price or otherwise, that he himself is holding the goods for the buyer, either the title thereupon passes, or, what amounts to the same thing, the rights of the parties will subsequently be adjusted as if it had passed at that time.[2] The remedy thus allowed is neither more nor less than specific performance of the contract. In a court of equity a contract for a purchase of land is enforced by a decree ordering the defendant to pay the price upon the transfer of title. In the case of a sale of goods the New York court and other courts following its rule allow the seller by force of his own expressed volition to make the buyer owner in spite of the buyer's dissent, and thereupon to recover the price.

Some states restrict the application of the New York doctrine to

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[1] "The vendor of personal property, in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself: (1) he may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or, (3) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price." Dustan *v.* McAndrew, 44 N. Y. 72, 78, *per* Earl, C. The same statement is expressly applied to executory contracts of sale in Ackerman *v.* Rubens, 167 N. Y. 405.

[2] It would follow that thereafter the risk of loss must be upon the buyer, and this is borne out by the reasoning in Neal *v.* Shewalter, 5 Ind. App. 147, 154. The property in question in that case after having been wrongfully refused by the buyer was destroyed by fire. The court said the goods "remained the property of the [sellers]. They did not place themselves in the position of bailees for the [buyers]. Therefore they would be entitled only to the difference between the contract price and the market price at the time and place at which the [buyers] became in default."

cases where the goods contracted for are of a peculiar kind, not readily salable on the market and as to which, therefore, a market price cannot readily be fixed.[1] The doctrine, whether in its broadest or most restricted form, at first sight strikes most legal theorists as both anomalous and erroneous. It is generally condemned by the text-writers.[2] But the rule in its more limited form should commend itself. The very fact of the wide adoption of a doctrine which is, and is known to be, contrary to the rule previously prevailing shows that the new doctrine must commend itself to the sense of justice of the courts, and if the matter be looked at broadly as one of justice rather than one of technical remedies permitted by our law, it will be hard to find a reason why the seller of land should be allowed to force the buyer to take it and pay the price while the manufacturer of goods for a special and peculiar order should not be. In such a case the seller may urge the very reason which courts of equity have habitually given for allowing specific performance of contracts in regard to sales of land, the inadequacy of damages. It is true the remedy is not mutual. The buyer is without specific redress if the seller refuses to make the goods, or refuses to give them up if he has made them. But the buyer is much less in need of the remedy of specific performance in this kind of case than the seller. If the seller does not manufacture the goods, the buyer can ordinarily do better by getting some one else to manufacture them than he could do by trying to force the seller to manufacture against his will. If the goods are already manufactured, the seller will rarely be disposed to withhold them from the buyer. The very fact that the goods are of a special kind and have no general market value will preclude the seller from making any other disposition of them. Doubtless cases could be put, however, where the buyer is in need of specific performance, but the fact that he is allowed no such right either at law or in equity ought not to debar the seller from specific redress. The requirement of mutuality has perhaps been pushed to the extreme of a technicality in equity.

It is not, however, chiefly because the rule is unjust that fault is found with it; it is rather because it seems at variance with estab-

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[1] Kinkead *v.* Lynch, 132 Fed. Rep. 692; Black River Lumber Co. *v.* Warner, 93 Mo. 374; Ozark Lumber Co. *v.* Chicago Lumber Co., 51 Mo. App. 555; Gordon *v.* Norris, 49 N. H. 376; Smith *v.* Wheeler, 7 Ore. 49; Ballentine *v.* Robinson, 46 Pa. St. 177.

[2] Mechem, Sales, § 1694; Burdick, Sales, 2 ed., § 364; Tiffany, Sales, § 103. Benjamin does not refer to it.

lished legal principles. It seems anomalous that the seller should be able to force title upon the buyer by simply electing to do so. This is probably the reason why many jurisdictions reject the New York doctrine and follow the English law.[1] Is it, however, so anomalous as is sometimes supposed for one party to an obligation to enforce it specifically against the other without the aid of a court of equity? Is it not constantly done in cases where rescission of title to personal property is allowed as a remedy? If a buyer obtains by fraud the seller's assent to transfer the ownership of goods, there is no doubt that the buyer gains title thereby.[2] Yet there is no more doubt that the seller may regain his title by his own election so to do. Not only may he bring trover,[3] but he may also bring replevin.[4] It can hardly be doubted that if the seller could regain possession of the goods peaceably without the aid of a court, he might do so, and would thereby be revested with title.[5] This is nothing else than specific enforcement of the obligation of the fraudulent buyer to return the title wrongfully acquired by him. Moreover the seller must, as a condition of recovery, return to the buyer what-

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[1] Grier *v.* Simpson, 8 Houst. (Del.) 7; John Deere Co. *v.* Gorman, 9 Kan. App. 675; Moody *v.* Brown, 34 Me. 107; Tufts *v.* Grewer, 83 Me. 407; Greenleaf *v.* Gallagher, 93 Me. 549; Greenleaf *v.* Hamilton, 94 Me. 118; Tufts *v.* Bennett, 163 Mass. 398; McCormick Machine Co. *v.* Balfany, 78 Minn. 370; Funke *v.* Allen, 54 Neb. 407; Unexcelled Fire Works Co. *v.* Polites, 130 Pa. St. 536; Jones *v.* Jennings, 168 Pa. St. 493; Puritan Coke Co. *v.* Clark, 204 Pa. St. 556 (but see Ballentine *v.* Robinson, 46 Pa. St. 177); Gammage *v.* Alexander, 14 Tex. 414; Tufts *v.* Lawrence, 77 Tex. 526; Rider *v.* Kelley, 32 Vt. 268; American Leather Co. *v.* Chalkley, 101 Va. 458, 463. See also Morris *v.* Cohn, 55 Ark. 401; First Bank *v.* Ragsdale, 171 Mo. 168, 185; Dowagiac Mfg. Co. *v.* Mahon, 101 N. W. Rep. 903 (N. D.).

[2] Thus, if the buyer resells the goods to a purchaser for value without notice, the latter gets an indefeasible title. Leask *v.* Scott, 2 Q. B. D. 376; Williamson *v.* Russell, 39 Conn. 406; Walp *v.* Mooar, 76 Conn. 515, 517; Hall *v.* Hinks, 21 Md. 406; National Bank *v.* Baltimore & Ohio R. R., 59 Atl. Rep. 134; Goodwin *v.* Mass. Loan and Trust Co., 152 Mass. 189, 198; Root *v.* French, 13 Wend. (N. Y.) 570. But if the buyer had acquired merely possession by fraud, not even a purchaser for value without notice could get title. Baehr *v.* Clark, 83 Ia. 313; Rohrbrough *v.* Leopold, 68 Tex. 254. So the seller may "affirm" the sale and sue for the agreed price, — a remedy which proceeds upon the assumption that title is in the buyer. See Schwartz *v.* McCloskey, 156 Pa. St. 258, 264.

[3] Thurston *v.* Blanchard, 22 Pick. (Mass.) 18; Moody *v.* Drown, 58 N. H. 45; Baird *v.* Howard, 51 Oh. St. 57, 22 L. R. A. 846.

[4] John V. Farwell Co. *v.* Hilton, 84 Fed. Rep. 293; Cox Shoe Co. *v.* Adams, 105 Ia. 402; Hall *v.* Gilmore, 40 Me. 578; Skinner *v.* Michigan Hoop Co., 119 Mich. 467; Field *v.* Morse, 54 Neb. 789; Baker *v.* McDonald, 104 N. W. Rep. 923 (Neb.), 1 L. R. A. (N. S.) 474; Sisson *v.* Hill, 18 R. I. 212, 21 L. R. A. 206.

[5] Wheelden *v.* Lowell, 50 Me. 499.

ever was paid for the goods.[1] Generally the buyer will refuse to receive it, and the seller may then tender it and recover as if he had actually returned it.[2] Let it be supposed the price was itself in the form of a chattel. When the defrauded seller tenders back this chattel, and the tender is refused, and the seller thereupon is allowed to recover what he had parted with or its full value, the relief necessarily proceeds upon the assumption that the seller has restored title to the buyer in the chattel given as the price, without the buyer's assent.[3] If the property in question is land and the buyer has fraudulently acquired a conveyance, the seller must go into equity in order to get a reconveyance, but in the case of a sale of goods he can regain title to what he has parted with and revest the buyer with title to the consideration without this procedure.

The same rules of law apply where rescission of title is allowed for other reasons than for fraud, — as mistake, duress, or infancy. So if an infant pleads his infancy in order to prevent recovery of the price of goods, the seller may replevy the goods.[4] This necessarily means that the seller by his own election enforces specifically the obligation of the infant to return the goods which he will not pay for. To say that the infant's plea is an assent to retransfer the goods is to state a fiction. It is immaterial whether the infant assents or expressly dissents.

The remedies allowed to an unpaid seller after the title has passed to the buyer, other than the right to recover the price, illustrate the same principle. The seller may by his own act take title out of the buyer and revest it either in himself or in a third person to whom a resale of the goods is made. The English law formerly denied this,[5] but the Sale of Goods Act now allows the right of resale.[6] As yet the law of England does not allow a rescission of

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[1] Save in exceptional cases. See 21 L. R. A. 206, n., and 1 L. R. A. (N. S.) 474.

[2] Barnett *v.* Speir, 93 Ga. 762; Porter *v.* Leyhe, 67 Mo. App. 540. See also Milliken *v.* Skillings, 89 Me. 180.

[3] In Nolan *v.* Jones, 53 Ia. 387, one party to an exchange, induced by fraud, was allowed replevin to recover his goods. The court says that because of the fraud the transaction was "void," but also says the plaintiff might have "affirmed" it. To the same effect is Porter *v.* Leyhe, 67 Mo. App. 540. *Cf.* Barnett *v.* Speir, 93 Ga. 762; Haase *v.* Mitchell, 58 Ind. 213, also cases of exchange.

[4] Badger *v.* Phinney, 15 Mass. 359.

[5] Martindale *v.* Smith, 1 Q. B. 389; Page *v.* Cowasjee Eduljee, L. R. 1 P. C. 127.

[6] § 48 (3). "Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and

the title otherwise than by resale, but the right of resale necessarily involves a transfer of title without the assent of the owner of the property. It does not help the matter to imply a fictitious agency calling the seller the agent of the buyer to resell. In this country the seller's right not simply to resell the goods, but to rescind the transfer of title and take title back to himself, is well recognized.[1] Thus, if the seller resells the goods for a greater price than that fixed by the original bargain, the original buyer is not entitled to the difference. It is the profit of the seller since he was justified in regarding the goods as his own.[2] The seller in thus acting is foreclosing his lien. In case he chooses to resell on account of the buyer it is a foreclosure by sale. In case he elects to retake title to himself it is a strict foreclosure. In the case of land a bill in equity might be necessary. In the case of goods the result is reached more summarily.

In the converse case, where the buyer seeks to rescind a transfer of title to him, whether for fraud, mistake, or breach of warranty, the same rule again prevails. The buyer may, if he chooses, recover the price that he has paid, and is not obliged to sue for the difference in value between the property which he has acquired and the price which he paid. He recovers the price in full if he elects to do so. This election necessarily operates as a transfer of the title back to the seller. The doctrine which permits one whose goods have been converted to "waive the tort" and sue for the value of the goods, or the price for which the converter has sold them, is another case where a plaintiff transfers title by his own action, without any assent of the defendant.[3] Indeed, even where trover is brought for the conversion, it is impossible to justify the existing rule of damages which gives the injured party the full value of the goods except on the theory that the title to the goods is transferred to the buyer. If the plaintiff were regarded as continuing the owner of the goods, he should recover damages equal in amount only to the loss which he suffered by the deprivation of possession

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recover from the original buyer damages for any loss occasioned by his breach of contract."

[1] See cases cited *ante*, p. 364, n. 1.

[2] Warren *v.* Buckminster, 24 N. H. 336; Bridgford *v.* Crocker, 60 N. Y. 627. See also Strickland *v.* McCulloch, 8 N. S. W. 324. So the Indian Contract Act, § 107, provides that the lien-holder, though title has passed, may resell the goods, and though "the buyer must bear any loss," he "is not entitled to any profit which may occur on such resale."

[3] See Keener, Quasi-Contracts, 159.

of the property. If the property were destroyed, of course this would equal the value of the goods; but if the property still remained in existence, it might well be a comparatively small amount.[1]

A case which presents a still closer analogy to that primarily under discussion arises in the law of conditional sales. As will be seen hereafter, in such sales the buyer may recover the full price, though title to the goods has not been transferred. It is further generally held that if the seller sues for the price, he cannot thereafter reclaim the goods, although according to the contract the title was to remain in the seller until the price was paid.[2] Thus the seller loses a title which by the contract was still to remain in

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[1] It is actually held that title to the goods passes to the defendant either when judgment is given for the plaintiff or when the execution upon the judgment is satisfied. See Miller *v.* Hyde, 161 Mass. 472. So late a time as either of these days seems somewhat inconsistent with the rule of damages, because in order to justify full damages it would seem on theory that the plaintiff must have had a cause of action justifying such damages at the time the action was brought, an assumption which can only be sustained as a universal rule on the theory that title to the property had passed to the defendant at that time. If we take the time of transfer of title, however, to be the later period when judgment is rendered or execution satisfied, there is still a case where title is transferred from one party to the other without the assent of both parties and without the aid of a court of equity.

[2] Parke Co. *v.* White River Co., 101 Cal. 37; Holt Mfg. Co. *v.* Ewing, 109 Cal. 353; Crompton *v.* Beach, 62 Conn. 25; Smith *v.* Gilmore, 7 D. C. App. 192; Richards *v.* Schreiber, 98 Ia. 422; Bailey *v.* Hervey, 135 Mass. 172; Whitney *v.* Abbott, 191 Mass. 59; Button *v.* Trader, 75 Mich. 295; Alden *v.* Dyer, 92 Minn. 134; Dowagiac Mfg. Co. *v.* Mahon, 101 N. W. Rep. 903, 905 (N. D.). See also Smith *v.* Barber, 153 Ind. 322. These decisions seem erroneous and are opposed to the following: Forbes Piano Co. *v.* Wilson, 144 Ala. 586; Jones *v.* Snider, 99 Ga. 276; Dederick *v.* Wolfe, 68 Miss. 500; McPherson *v.* Acme Lumber Co., 70 Miss 649; Campbell Press Co. *v.* Rockaway Pub. Co., 56 N. J. L. 676. See also Thomason *v.* Lewis, 103 Ala. 426; Fuller *v.* Byrne, 102 Mich. 461; Matthews *v.* Lucia, 55 Vt. 308. The error in the decisions first cited is this, — the reservation of title by the seller is for the purpose of securing the price. The transaction is in its essence the same as a chattel mortgage given by the buyer on the purchased property to secure the price. Just as the mortgagee may sue for the price and also foreclose his mortgage upon the property, so the seller in a conditional sale should be allowed to sue for the price and also reclaim the property, not as his own, but for the purpose of foreclosing it; that is, — for the purpose of endeavoring to realize from it the full amount due him. Of course, as in the case of a mortgage, the seller should be restricted to satisfaction of his claim with interest. If, therefore, judgment for the price is satisfied in part, this should be credited, and any excess over the amount due, which may be acquired by seizing and disposing of the goods, should be returned to the buyer. Though the cases cited at the beginning of this note may be erroneous for the reason just given, the error does not relate to the matter for which the cases are here cited; namely, the power of a court of law to treat an election on the part of the plaintiff as effectual to transfer title to property to the defendant.

him, and the buyer acquires it when and because the seller elects to sue for the price. A further illustration is found if the seller under a conditional sale attaches or levies execution upon the property sold. Even in jurisdictions which do not regard the mere act of suing for the price a binding election, such a seizure debars the seller from thereafter reclaiming the property. In effect it transfers title to the buyer.[1] The same rule is applied in the case of chattel mortgages. Even in jurisdictions where it is held that a mortgage vests a legal title in the mortgagee, attachment of the goods by him deprives him of all rights of ownership in the property.[2]

A somewhat analogous doctrine of self-help exists in the law of executory contracts. If one party to such a contract is guilty of a material breach, the other party may elect to rescind it. Courts have sometimes endeavored to make out mutual assent by calling the breach or repudiation of the wrongdoer in such a case the offer to rescind; but this is an obvious fiction. In truth, the wrongdoer is under an obligation to permit the rescission of the contract, and the injured party is allowed to enforce the obligation by treating the contract as rescinded without the aid of a court.[3]

The illustrations which have been given show that the allowance of what is in effect specific performance of an obligation, or the transfer of title at the election of one party without the assent of the other without resort to a court of equity, is not unusual in our law, and most persons would hesitate to say that in these illustrative cases the plaintiff should be denied the specific execution of the obligation due him. Courts of equity have confined the right of specific performance of affirmative obligations in regard to personal property so narrowly that either injustice must be done or the necessary remedy must be sought in another way. Indeed, it may be questioned whether the remedy of a bill in equity would be so satisfactory in the case of ordinary sales of goods as the shorter cut afforded by courts of law. If the proper equitable remedy cannot be adequately reproduced by the

[1] Tanner Engine Co. *v.* Hall, 89 Ala. 628; Montgomery Iron Works *v.* Smith, 98 Ala. 664; Fuller *v.* Eames, 108 Ala. 464; Albright *v.* Meredith, 58 Oh. St. 194.

[2] Libby *v.* Cushman, 29 Me. 429; Whitney *v.* Farrar, 51 Me. 418; Evans *v.* Warren, 122 Mass. 303; Dyckman *v.* Sevatson, 39 Minn. 132; Haynes *v.* Sanborn, 45 N. H. 429.

[3] See Wald's Pollock, Contracts, 3 ed., 339 *et seq.* In France and Louisiana the injured party brings an action in court for the rescission of the contract.

procedure of a court of law, it is doubtless wrong for it to invade the province of equity. Likewise the results which equity with its elastic decrees reaches in analogous cases must be taken as the standard of permissible relief, and it is only to reach such results by the judgment of a court of law or by permitting an injured person to work out his own redress, that relief in these summary ways should be allowed. But where the same result can be reached at law as in equity, the court of law not only may invade the province of equity, but it should do so if the rule of equity is more just. Especially should it do so if the court of equity for technical reasons refuses to take jurisdiction of the case, and the court of law must give the only available remedy. Where a seller has prepared goods of a special and peculiar kind under a contract and the buyer wrongfully refuses to take them, this reasoning is particularly applicable. Damages are not an adequate remedy for the seller. He does not want the goods himself and he cannot resell them readily, yet they are not without value, and if he is confined to the difference between their value and the contract price, a substantial diminution from the price would be made. Further, a court of equity will not take jurisdiction of the case. Though there is the same reason for doing so as exists in the case of a contract for the sale of land, so far at least as the seller's side of the bargain is concerned, courts of equity have been indisposed to extend their jurisdiction to such cases.[1]

It is worth noticing that in the civil law the buyer is entitled to recover the full price when the seller is in default. By the classical civil law title never passed until delivery of the goods.[2] So that in any case to allow the buyer to recover the full price when the seller refused to accept delivery necessarily involved recovery of the price by one who had not transferred the title.[3] The Ro-

[1] It should perhaps be said, in order to prevent misapprehension, that the rule contended for is only applicable where the contract has been broken by the buyer after the goods have been procured or manufactured. If the buyer repudiates his contract or countermands his order before the goods have been manufactured or procured by the seller, he ought not to be allowed, and generally is not allowed, to enhance the damage of the buyer by manufacturing or procuring the goods. Wald's Pollock, Contracts, 3 ed., 349.

[2] Moyle, Contract of Sale in the Civil Law, 110.

[3] Pothier, Contract of Sale, § 280: "When the contract contains no provision for credit, the seller may immediately commence this action (*actio venditi*) against the buyer upon making the offer which he ought to do to deliver the thing, provided it is not already delivered. If after the contract the thing ceases, without the fault of the seller, to be in a situation to be delivered, the seller is not thereby deprived of his right

man law, indeed, went further than this. Even though the goods had been destroyed by accident before delivery, and therefore before transfer of title, the risk was thrown on the buyer, and the seller was allowed to recover the price.[1] It may therefore be urged that the Roman law virtually made the promises of buyer and seller independent, and that as such a doctrine is not only clearly inconsistent with our law, but also with fundamental principles of justice, no desirable suggestion or analogy can be derived from that system of jurisprudence. The rule of the classical Roman law in regard to risk is, however, generally abolished today in Europe;[2] and the recognition of the dependency of the promises in a bilateral contract is as completely recognized, perhaps more completely recognized, on the continent of Europe than in England.[3] But in spite of this, the rule in regard to the recovery of the price persists. This is true in France.[4] So the old German commercial code, which was in force not simply in Germany but also in Austria, and is still in force in the latter country, provides: "If the buyer is in default in accepting the goods, the seller may deposit them, at the risk and expense of the buyer, in a public warehouse or otherwise in a safe manner."[5] The new commercial code in force throughout the German Empire since 1897 copies this provision.[6] Even in Scotland the same rule prevails today, for the rule of the civil law is preserved in the Sale of Goods Act.[7]

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of commencing his action for the payment of the price. But while the seller is in default in delivering the thing sold, he cannot demand the price of it."

[1] See 9 HARV. L. REV. 72.

[2] See 9 HARV. L. REV. 76.

[3] See 13 HARV. L. REV. 80.

[4] Code Civil, art. 1138, 1652; 2 Troplong, n. 603; Massé et Vergé, n. 10.

[5] Handelsgesetzbuch, § 343.

[6] Handelsgesetzbuch of 1897, § 373. In commenting upon this provision Lehmann and Ring say in their Kommentar zum Bürgerlichen Gesetzbuche und seinen Nebengesetze (Berlin, 1901), ii, 101, "Since the seller is no longer responsible for the goods, he acquires the right to the price and must only make allowance for what he saves in consequence of being freed from performance or what he acquires or wrongfully fails to acquire through other application of his labor. He can also recover from the buyer indemnity for the necessary expenses for the care and custody of the goods. He must even be allowed a claim for storage if he is a merchant."

[7] "§ 49. (3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be." Chalmers, in his annotation of the section, quotes as the authority for this provision, Mercantile Law Commission, 1855, second report, p. 47: "The seller may sue the purchaser for the price and interest, whether the goods sold are specified or not, provided goods according to the contract have been tendered to the purchaser."

The second sub-section of the English statutory provision relating to the recovery of the price provides that the price may be recovered where it is payable on a day certain, irrespective of delivery, although the property in the goods has not passed. It is a matter of construction in every case whether the price is payable on a day certain, irrespective of delivery. The contract will rarely so provide in terms, and the proper construction must generally depend upon the relative time fixed by the contract for performance on one side and the other. The rules of construction applicable here are the same which are applied to contracts generally. Contracts to sell, indeed, present a typical case for the application of the doctrines of implied conditions. Unless there is ground for a contrary supposition, courts will assume that the payment of the price and the delivery of the goods were intended to be concurrent acts, and the obligation of each party to perform will be dependent upon the simultaneous performance by the other party.[1] Even though a date be fixed for the performance on one side, and no date fixed for the counter-performance, the same principle will be applied unless there is something in the contract or surrounding circumstances to show that the performance for which the time was not fixed could not in its nature be given, or was not intended to be given on the same day as the performance for which the time was fixed.[2] If, however, different times are fixed for the payment of the price and the delivery of the goods, the general rule, undoubtedly, is that adopted from Lord Holt's opinion in Thorpe *v.* Thorpe,[3] that the act which is by the contract to be performed first is absolutely due on that day, while the performance which is to take place on a later day is not due unless as a condition precedent the prior performance has been rendered. Generally, if performance by either buyer or seller is to precede the performance

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[1] Cole *v.* Swanston, 1 Cal. 51; Merrill Furniture Co. *v.* Hill, 87 Me. 17; Haskins *v.* Warren, 115 Mass. 514, 533; Southwestern Freight Co. *v.* Stannard, 44 Mo. 71; Whitman Agricultural Ass'n *v.* National Ass'n, 45 Mo. App. 90; La Mont *v.* La Fevre, 96 Mich. 175; Walter *v.* Reed, 34 Neb. 544; Chapman *v.* Lathrop, 6 Cow. (N. Y.) 109; Wabash Elevator Co. *v.* First Nat'l Bank, 23 Oh. St. 311; Cleveland *v.* Pearl, 63 Vt. 127.

[2] Morton *v.* Lamb, 7 T. R. 125; Brennan *v.* Ford, 46 Cal. 7, 16; Sanborn *v.* Shipherd, 59 Minn. 144; Dunham *v.* Pettee, 8 N. Y. 508.

[3] 12 Mod. 455. Lord Holt was considering only when the word "for" or its equivalent made a promise conditional, but the rules he laid down were adopted in Serjeant Williams' notes to Pordage *v.* Cole, 1 Wms. Saund. 319 l, as applicable to all mutual promises irrespective of the word "for." Lord Mansfield's decision in Kingston *v.* Preston, 2 Dougl. 689, clearly warranted this extension.

of the other, it is the seller's performance that will come first. It is common for sellers to give credit for the price. It is not common for buyers to give credit for the goods. It may, however, happen in a particular case that the buyer promises to pay the price before acquiring the title or even the possession of the goods. In such a case the provisions of sub-section (2) are applicable, and the seller is by the terms of the contract entitled to recover the price.

Apparently under the English statute this right to recover the price would not depend in any way upon the prospective performance, or failure to perform, of the seller. There can be no doubt that by agreeing to pay the price before the transfer of the goods the buyer agrees to take the risk of the seller's subsequent performance under ordinary circumstances. Let it be supposed, however, that it becomes evident, before the time for payment of the price, that the seller will not perform when the day comes for the delivery of the goods. It is a manifest injustice if the buyer must pay the price knowing that all he will get is a right of action against the seller. It is true the buyer has agreed positively to pay on the day, but he made that agreement on the assumption that the seller was going to perform subsequently, an assumption which is no longer justified. The cases, therefore, rightly excuse the buyer from his obligation to pay the price under these circumstances. The ground of the excuse is, in substance, failure of consideration, although the consideration of the buyer's promise is not the seller's performance but the seller's promise. The parties contemplate a double exchange. They exchange promises when the contract is made and they plan to exchange performances later. The fact that the performances are not to be simultaneous does not alter the fact that one performance is regarded as the price or exchange of the other. Accordingly there is in justice as good reason for excusing the party from whom the prior performance is due, when he will not get the subsequent performance from the other party, as there is for excusing the latter party when default of his co-contractor has already taken place. Prospective failure to receive the promised exchange, if the prospect is sufficiently certain, therefore should be, and in fact is, held by the courts to be as good a defense as a failure which has actually occurred.

Several classes of cases illustrate this. If the party from whom the second performance is due becomes insolvent, this is an excuse

to the other party.[1] So a voluntary transfer to a third person of the property to which the contract related is an excuse, and rightly, inasmuch as this indicates generally both an inability and an unwillingness to perform.[2] It has been suggested in some cases that the seller might regain the property before the time for performance and, therefore, the buyer should not be excused.[3] It is always a question of fact what the prospects for the re-acquisition of the property by the seller are, but in an ordinary case it would seem that the disposition of the property by the seller both indicates a repudiation of his obligation, and also puts him in a position where, even though willing to perform subsequently, he could not do so unless the third person who bought the property consented to resell it. This is a contingency not within the original contemplation of the parties and the risk of which the buyer ought not to be compelled to run. For the same reason any repudiation on the part of the party from whom the subsequent performance is due, will excuse the party from whom the prior performance is due.[4] The whole doctrine of allowing suit on a contract before the time for performance has come, in case of repudiation, was based in the leading decision on the necessity of giving the innocent party an excuse for not perform-

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[1] *Ex parte* Chalmers, L. R. 8 Ch. 289; Bloomer *v.* Bernstein, L. R. 9 C. P. 588; Morgan *v.* Bain, L. R. 10 C. P. 15; Mess *v.* Duffus, 6 Comm. Cas. 165; *Re* Phœnix Bessemer Steel Co., 4 Ch. D. 108; Robertson *v.* Davenport, 27 Ala. 574; Brassel *v.* Troxel, 68 Ill. App. 131; Rappleye *v.* Racine Seeder Co., 79 Ia. 220; Hobbs *v.* Columbia Falls Co., 157 Mass. 109; Lennox *v.* Murphy, 171 Mass. 370, 373; Pardee *v.* Kanady, 100 N. Y. 121; Vandegrift *v.* Cowles Engineering Co., 161 N. Y. 435; Diem *v.* Koblitz, 49 Oh. St. 41; Dougherty Bros. *v.* Central Bank, 93 Pa. St. 227; Lancaster Bank *v.* Huver, 114 Pa. St. 216. See also Sale of Goods Act, §§ 18, 41. *Cf. Ex parte* Pollard, 2 Low. (U. S.) 411; Stokes *v.* Baars, 18 Fla. 656; Chemical Nat'l Bank *v.* World's Columbian Exposition, 170 Ill. 82; C. F. Jewett Pub. Co. *v.* Butler, 159 Mass. 517; Bank Commissioners *v.* New Hampshire Trust Co., 69 N. H. 621. In all these cases the seller's performance was first due, but there can be no difference in result when the buyer is first to perform.

The German Civil Code provides, § 321: "one who is bound to the prior performance in a bilateral contract, if the solvency of the other party is materially diminished after the formation of the contract, by means of which the claim for the subsequent counter-performance is endangered, may refuse to perform the obligation due from him until the counter-performance is rendered or security for it furnished."

[2] Fort Payne Co. *v.* Webster, 163 Mass. 134; Meyers *v.* Markham, 90 Minn. 230; James *v.* Burchell, 82 N. Y. 108; Broadhead *v.* Reinbold, 200 Pa. St. 618. See also Leonard *v.* Bates, 1 Blackf. (Ind.) 172; Russ Lumber Co. *v.* Muscupiabe Co., 120 Cal. 521.

[3] Garberino *v.* Roberts, 109 Cal. 125; Webb *v.* Stephenson, 11 Wash. 342. See also Joyce *v.* Shafer, 97 Cal. 335; Shively *v.* Semi-Tropic Co., 99 Cal. 259. These cases, like those in the preceding note, relate to real estate.

[4] Ripley *v.* M'Clure, 4 Exch. 345.

ing or preparing to perform his promise.[1] Though the reason given does not warrant the conclusion reached that the innocent party must have an immediate right of action, there can be no doubt of the correctness of the reason itself.[2]

Another illustration of the fact that the liability of the party who is to perform first is not so absolute as to be wholly independent of anything which the other party to the contract may do, is shown by the fact that if the party from whom the prior performance is due does not in fact perform until after the time when performance by the other party is due, his liability immediately becomes conditional on the performance of the later promise. The commonest illustration of this, perhaps, is where goods are sold on credit, but delivery has not been made when the term of credit expires. In such a case the seller's lien revives, or, in other words, the obligation of the seller to deliver becomes conditional on the performance by the buyer of his promise to pay the price.[3] This application of the principle is universally admitted, and by the weight of modern authority in this country, at least, the broader principle is laid down that wherever suit is not brought for the earlier performance until after the time for the later performance, the defendant's liability becomes conditional on performance or tender of performance by the plaintiff.[4]

Conditional sales, so called, present the only class of cases where it is at all usual for the buyer to agree to pay the price before he acquires title to the property. In such sales the practice is for the

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[1] Hochster *v.* De La Tour, 2 E. & B. 678.

[2] Wald's Pollock, Contracts, 3 ed., 361.

[3] Sale of Goods Act, § 41 (1) (b). The statutory provision is based on the decisions of New *v.* Swain, 1 Dans. & L. 193; Bunney *v.* Poyntz, 4 B. & Ad. 568. So in this country, Leahy *v.* Lobdell, 80 Fed. Rep. 665, 667 (C. C. A.); McElwee *v.* Metropolitan Lumber Co., 69 Fed. Rep. 302 (C. C. A.); Robinson *v.* Morgan, 65 Vt. 37.

[4] Hill *v.* Grigsby, 35 Cal. 656; McCroskey *v.* Ladd, 96 Cal. 455; Irwin *v.* Lee, 34 Ind. 319; Soper *v.* Gabe, 55 Kan. 646; Brentnall *v.* Marshall, 10 Kan. App. 488; Beecher *v.* Conradt, 13 N. Y. 108; Eddy *v.* Davis, 116 N. Y. 247; Shelly *v.* Mikkelson, 5 N. D. 22; Boyd *v.* McCullough, 137 Pa. St. 7, 16; First National Bank *v.* Spear, 12 S. D. 108; Hogan *v.* Kyle, 7 Wash. 595. See also McElwee *v.* Bridgeport Land Co., 54 Fed. Rep. 627 (C. C. A.). But see *contra*, Weaver *v.* Childress, 3 Stew. (Ala.) 361; Hays *v.* Hall, 4 Port. (Ala.) 374, 387; White *v.* Beard, 5 Port. (Ala.) 94, 100; Duncan *v.* Charles, 5 Ill. 561; Sheeren *v.* Moses, 84 Ill. 448; Gray *v.* Meek, 199 Ill. 136, 139; Allen *v.* Sanders, 7 B. Mon. (Ky.) 593; Coleman *v.* Rowe, 6 Miss. 460; Clopton *v.* Bolton, 23 Miss. 78; McMath *v.* Johnson, 41 Miss. 439; Bowen *v.* Bailey, 42 Miss. 405; Biddle *v.* Coryell, 3 Har. (N. J.) 377. See also Loud *v.* Pomona Land Co., 153 U. S. 564, 580; Bean *v.* Atwater, 4 Conn. 3; White *v.* Atkins, 8 Cush. (Mass.) 367; Kettle *v.* Harvey, 21 Vt. 301.

buyer to be given possession of the thing purchased; the seller retaining title, however, until the price is paid. Sometimes none of the price is paid at the time the goods are delivered; more frequently an instalment of the price is payable then and the balance of the price is payable either in instalments or as a whole at a later time. Such a transaction is in its essence analogous to a transfer of title to the buyer, and a mortgage back by the buyer to the seller in order to secure the price. If the bargain related to real estate, it would probably take that form. When it relates to chattels, largely, perhaps, because the value of the subject matter of the bargain is not great enough to make desirable formalities usual with real estate, the parties, as a short cut to reach the same result, generally provide that the seller shall retain title. He retains it, however, merely as security. The beneficial interest in the property, so far as is not inconsistent with the security of the seller, is vested in the buyer.[1]

In conditional sales the buyer, relying on his possession of the goods as sufficient to secure him for such portion of the price as he may pay before title passes to him, is content to pay part of the price in advance. He does not, however, in any common case pay any part of the price until delivery. For this reason

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[1] In Carpenter *v.* Scott, 13 R. I. 477, 479, speaking of such a sale, the court said: "Under it the vendee acquires not only the right of possession and use, but the right to become the absolute owner upon complying with the terms of the contract. These are rights of which no act of the vendor can divest him, and which, in the absence of any stipulation in the contract restraining him, he can transfer by sale or mortgage. Upon performance of the condition of the sale, the title of the property vests in the vendee, or, in the event that he has sold or mortgaged it, in his vendee or mortgagee without further bill of sale. Day *v.* Bassett, 102 Mass. 445, 447; Crompton *v.* Pratt, 105 Mass. 255, 258; Currier *v.* Knapp, 117 Mass. 324, 325, 326; Chace *v.* Ingalls, 122 Mass. 381, 383." In Chicago Railway Equipment Company *v.* Merchants' Bank, 136 U. S. 268, 283, while referring to notes each of which contained a statement that it was given for personal property the title to which should remain in the payee until the note was paid, Harlan, J., who delivered the opinion of the court, said: "The agreement that the title should remain in the payee until the notes were paid . . . is a short form of chattel mortgage. The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid. . . . The suggestion that the maker could not have been compelled to pay if the cars had been destroyed before the maturity of the notes, is without any foundation upon which to rest. The agreement cannot properly be so construed. The cars having been sold and delivered to the maker, the payee had no interest remaining in them except by way of security for the payment of the notes given for the price."

The common statutes requiring a conditional sale, like a chattel mortgage, to be recorded, show a general recognition of the similarity of the two transactions.

the wording of the English Sale of Goods Act is unfortunate. The Act apparently fails to provide for the case which it is intended to cover. Sub-section (2) of the section under consideration[1] allows a recovery of the price where it "is payable on a day certain, irrespective of delivery . . . although the property in the goods has not passed." The insertion of the words "irrespective of delivery" gives the sub-section an inadequate effect, and these words seem somewhat inconsistent with the end of the sentence quoted. In conditional sales the seller who has delivered possession should certainly be allowed to recover the full price, because by the terms of the bargain the price is to be paid irrespective of the transfer of title; but the price is not to be paid irrespective of delivery, and under the English statute it is hard to see how the seller could recover more than the difference between the contract price and the market price for the goods. In this country there seems to be no reason to doubt that the seller, if he has delivered the goods to the buyer, may recover the full price.[2] In many jurisdictions the seller is allowed to recover the price, even though the subject matter of the sale has been accidentally destroyed.[3] Such decisions necessarily involve the seller's right to recover the price irrespective of transfer of title. The contrary decisions contain, however, no implication that if the property had not been destroyed the seller could not recover the instalments of the price payable before the time for transferring title.

Of course it is entirely possible to make the price payable irrespective of delivery as well as of transfer of title,[4] but such a contract must be unusual.

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[1] § 49.

[2] Smith *v.* Aldrich, 180 Mass. 367; Whitney *v.* Abbott, 191 Mass. 59. As Massachusetts does not permit the seller, generally, to recover the full price until title has passed, the decision has peculiar force. See also Tufts *v.* Poness, 32 Ont. 51.

[3] Chicago Equipment Co. *v.* Merchants' Bank, 136 U. S. 268, 283; Burnley *v.* Tufts, 66 Miss. 48; Tufts *v.* Wynne, 45 Mo. App. 42; American Soda Fountain Co. *v.* Vaughn, 69 N. J. L. 582; Tufts *v.* Griffin, 107 N. C. 47; Topp *v.* White, 12 Heisk. (Tenn.) 165; Lavalley *v.* Ravenna, 62 Atl. Rep. 47 (Vt.); Goldie *v.* Harper, 31 Ont. 284. See also Cooper *v.* Chicago Organ Co., 58 Ill. App. 248; Osborn *v.* South Shore Co., 91 Wis. 526; Hesselbacher *v.* Ballantyne, 28 Ont. 182. There are, however, a number of contrary decisions. Arthur *v.* Blackman, 63 Fed. Rep. 536; American Soda Fountain Co. *v.* Blue, 40 So. Rep. 218 (Ala.); Bishop *v.* Minderhout, 128 Ala. 162; Randle *v.* Stone, 77 Ga. 501; Glisson *v.* Heggie, 105 Ga. 30, 32; Mountain City Co. *v.* Butler, 109 Ga. 469; Swallow *v.* Emery, 111 Mass. 355; Sloan *v.* McCarty, 134 Mass. 245; Cobb *v.* Tufts, 2 Willson Civ. Cas. (Tex.) § 154.

[4] See Gray *v.* Booth, 64 N. Y. App. Div. 231.

For the reasons here given, in the proposed Sales Act of the Conference of Commissioners for Uniform State Laws the English statutory provision is thus changed:

"§ 63.—[ACTION FOR THE PRICE.] (1) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

"(2) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

"(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of § 64 (4) [1] are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's, and may maintain an action for the price."

Samuel Williston.

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[1] "§ 64. (4) If, while labor or expense of material amount is necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages."